

Message Text

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FM SECSTATE WASHDC

TO AMEMBASSY MANILA

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E.O. 11652: GDS

TAGS:EGEN, ETRD, RP

SUBJECT: LAUREL-LANGLEY EXPLORATORY TALKS: DRAFT U.S. -

PHILIPPINE TREATY OF AMITY AND ECONOMIC RELATIONS

REFS: MANILA 8453, 8554

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1. DEPT GREATLY APPRECIATES EFFORTS OF EMBASSY IN PREPAR-
ING DRAFT OF AER TREATY FOR DISCUSSION WITH GOP AND
COMMENDS EMB FOR EXCELLENCE OF ITS COMMENTS. ALTHOUGH WE
BELIEVE THAT SEVERAL OF THE CHANGES PROPOSED BY EMB IN TOGO

DRAFT SHOULD NOT BE PRESENTED TO GOP AT THIS TIME, IT WILL BE USEFUL TO HAVE FALLBACK LANGUAGE READY IN SOME AREAS. THIS MESSAGE OUTLINES DRAFT AGREEMENT CLEARED WITHIN DEPTS OF STATE AND COMMERCE FOR PRESENTATION TO GOP, AND DISCUSSES REASONS FOR DIFFERENCES BETWEEN THIS DRAFT AND THAT PROPOSED BY EMB. FULL TEXT BEING POUCHED.

2. WE AGREE THAT ASSOCIATION OF DRAFT WITH TOGO WILL NOT BE HELPFUL, DUE TO DIFFERENCES IN SITUATIONS OF TWO COUNTRIES, AND CONCUR IN SUGGESTION THAT AGREEMENT BE REFERRED TO HEREAFTER AS DRAFT AER WITH THE PHILIPPINES. DRAFT AGREEMENT IS BASICALLY STANDARD U.S. AER DRAFT, MODIFIED TO MEET PARTICULAR CIRCUMSTANCES OF U.S. PHILIPPINE RELATIONSHIP.

3. IN THIS CONNECTION, WE BELIEVE IT WOULD BE USEFUL TO INSERT A SHORT PREAMBLE, FORMULATED ALONG MODERN LINES, WHICH WILL SERVE TO DISTINGUISH THE DRAFT AGREEMENT FROM OTHERS TO WHICH THE U.S. IS A PARTY. SUCH PREAMBLE WOULD READ:

QTE. THE UNITED STATES OF AMERICA AND THE
REPUBLIC OF THE PHILIPPINES,

CONSCIOUS OF THE HISTORICALLY CLOSE AND FRIENDLY
RELATIONS THAT EXIST BETWEEN THEM;

DESIROUS OF MAINTAINING, DEVELOPING AND EXPAND-
ING THOSE RELATIONS IN ACCORDANCE WITH THE RESPEC-
TIVE NEEDS AND OBJECTIVES OF THE TWO COUNTRIES IN
THE CONTEXT OF A MODERN AND RAPIDLY CHANGING WORLD;
AND

SEEKING TO STRENGTHEN AND BROADEN THE BASIS FOR
MUTUALLY ADVANTAGEOUS TRADE, INVESTMENT, AND GENERAL
ECONOMIC RELATIONSHIPS;

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AGREE AS FOLLOWS:

4. ARTICLE I;1 AND 2 (TOGO TEXT).

5. ARTICLE I:3. DEPT FAVORS PRESENTATION OF FOLLOWING
TEXT:

QTE: THE PROVISIONS OF PARAGRAPH 2 SHALL
EXTEND TO (A) SPOUSES AND UNMARRIED MINOR CHILDREN
OF PERSONS REFERRED TO IN SUCH PARAGRAPH, IF
ACCOMPANYING OR FOLLOWING TO JOIN SUCH PERSONS; AND
(B) PERSONS WHO REPRESENT NATIONALS AND COMPANIES
OF THE SAME NATIONALITY WHICH HAVE INVESTED OR ARE

ACTIVELY IN THE PROCESS OR INVESTING A SUBSTANTIAL AMOUNT OF CAPITAL (WHETHER OR NOT A MAJORITY) IN AN ENTERPRISE IN THE TERRITORIES OF THE OTHER PARTY, AND WHO ARE EMPLOYED BY SUCH NATIONALS AND COMPANIES IN A RESPONSIBLE CAPACITY. UNQTE.

COMMENT: THE ABOVE PROVISION, WHICH IS ESSENTIALLY NEW, (1) INCORPORATES THE LANGUAGE REGARDING SPOUSES AND MINOR CHILDREN FROM THE EXCHANGE OF NOTES ON TREATY TRADERS AND TREATY INVESTORS, AND) REPLACES ARTICLE XIII:4 OF THE TOGO TREATY. EXCEPT FOR EXPLICIT LANGUAGE ON SPOUSES AND MINOR CHILDREN, TOGO TEXT IS BROADER THAN EXCHANGE OF NOTES, SINCE IT PERMITS ENTRY FOR ALL NATIONALS OF THE OTHER PARTY; EXCHANGE OF NOTES IS LIMITED TO INVESTORS AND NATIONALS SEEKING TO CARRY ON "SUBSTANTIAL TRADE". IN OUR VIEW, IF GOP ACCEPTS ABOVE

ARTICLE, EXCHANGE OF NOTES MAY BE TERMINATED. ADDITION OF PARENTHETICAL EXPRESSION "WHETHER OR NOT A MAJORITY" AS TO MAKE CLEAR THAT "SUBSTANTIAL AMOUNT OF CAPITAL" AS USED IN PARAGRAPH 2 NEED NOT REPRESENT A MAJORITY INTEREST, AND THAT THE RIGHT TO USE AGENTS EXTENDS TO ALL INVESTORS OF A SUBSTANTIAL AMOUNT OF CAPITAL.

6. ARTICLE I:4 (TOGO ARTICLE I:3).

7. ARTICLE II:1. DEPT FAVORS PRESENTATION OF FOLLOWING LIMITED OFFICIAL USE
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TEXT:

QTE. NATIONALS OF EITHER PARTY SHALL RECEIVE MOST CONSTANT PROTECTION AND SECURITY WITHIN THE TERRITORIES OF THE OTHER PARTY, IN NO CASE LESS THAN THAT REQUIRED BY INTERNATIONAL LAW. WHEN ANY SUCH NATIONAL IS IN CUSTODY, HE SHALL IN EVERY RESPECT RECEIVE REASONABLE AND HUMANE TREATMENT; AND THE DIPLOMATIC OR CONSULAR REPRESENTATIVE OF HIS COUNTRY SHALL BE IMMEDIATELY NOTIFIED BY THE APPROPRIATE AUTHORITIES OF THE DETAINING PARTY, AND ACCORDED FULL OPPORTUNITY TO SAFEGUARD HIS INTERESTS. HE SHALL PROMPTLY BE INFORMED OF THE ACCUSATIONS AGAINST HIM, PERMITTED TO COMMUNICATE WITH THE DIPLOMATIC OR CONSULAR REPRESENTATIVES OF HIS COUNTRY, ALLOWED AMPLE FACILITIES TO DEFEND HIMSELF, AND GIVEN A PROMPT AND IMPARTIAL DISPOSITION OF HIS CASE. UNQTE.

COMMENT: EMBASSY CORRECTLY NOTES THAT TOGO TEXT IS INADEQUATE IN THE PHILIPPINE CONTEXT, SINCE OBLIGATION ALREADY EXISTS TO NOTIFY CONSULAR OFFICIALS IN CASES OF

ARREST. IT WOULD NOT BE APPROPRIATE TO INSERT LANGUAGE FROM THE 1947 CONSULAR CONVENTION, HOWEVER, SINCE THAT AGREEMENT SPEAKS IN GENERAL IN TERMS OF RIGHTS OF CONSULAR OFFICIALS, WHEREAS AER IS DESIGNED TO SET FORTH RIGHTS OF NATIONALS AND COMPANIES. TO BE CONSISTENT WITH CONSULAR CONVENTION, ABOVE LANGUAGE MODIFIES TOGO LANGUAGE TO (1) ELIMINATE REQUIREMENT THAT DETAINED PERSON REQUEST NOTIFICATION OF CONSULAR AUTHORITIES BEFORE OBLIGATION EXISTS ON PART OF DETAINING GOVERNMENT, (2) IMPOSE THE OBLIGATION DIRECTLY UPON THE "APPROPRIATE AUTHORITIES OF THE DETAINING PARTY", AND (3) ACCORD TO THE DETAINED PERSON A CONTINUING RIGHT TO COMMUNICATE WITH DIPLOMATIC AND CONSULAR REPRESENTATIVES OF HIS COUNTRY, AS PROVIDED IN ARTICLE VII:3 OF THE CONSULAR CONVENTION. IN OUR VIEW, ABOVE TEXT PROVIDES ALL NECESSARY PROTECTION TO U.S. NATIONALS DETAINED IN THE PHILIPPINES, AND IS IN ACCORD WITH ALTERNATE EMBASSY SUGGESTION.

8. ARTICLE II:2 (TOGO TEXT).
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9. ARTICLE III (TOGO TEXT).

10. ARTICLE IV:1. DEPT PREFERS PRESENTATION OF TOGO TEXT WITHOUT CHANGE.

COMMENT: WE APPRECIATE EMBASSY'S VIEW THAT WORDS "LEGALLY ACQUIRED" MAY BE A RED FLAG TO GOP. WE ARE FEARFUL, HOWEVER, THAT ABSENCE OF WORDS MAY BE EVEN MORE OF ONE, SINCE THIS FORMULATION OCCURS IN ALL RECENT AER-TYPE TREATIES. PRESENCE OF PHRASE WILL THUS BE EASIER TO DEFEND THAN ITS ABSENCE; WE HAVE NO DESIRE, OF COURSE, TO PROTECT RIGHTS NOT LEGALLY ACQUIRED.

11. ARTICLE IV:2 AND 3 (TOGO TEXT).

12. ARTICLE V:1. DEPT FAVORS PRESENTATION OF FOLLOWING TEXT:

QTE. NATIONALS AND COMPANIES OF EITHER PARTY SHALL BE ACCORDED NATIONAL TREATMENT WITH RESPECT TO ESTABLISHING, AS WELL AS WITH RESPECT TO ACQUIRING INTERESTS IN, ENTERPRISES OF ALL TYPES FOR ENGAGING IN COMMERCIAL, INDUSTRIAL, FINANCIAL AND OTHER BUSINESS ACTIVITIES WITHIN THE TERRITORIES OF THE OTHER PARTY. UNQTE.

COMMENT: WE HAVE DECIDED TO REVERT TO FORMAT OF THAI TREATY IN THIS ARTICLE, WHICH IS MORE UNDERSTANDABLE AND COMPORTS BETTER WITH LANGUAGE WE ARE PROPOSING FOR ADDITION IN PARA. 2, BELOW.

13. ARTICLE V:2. DEPT FAVORS PRESENTATION OF FOLLOWING TEXT:

QTE. EACH PARTY RESERVES THE RIGHT TO LIMIT THE EXTENT TO WHICH ALIENS MAY ESTABLISH OR ACQUIRE INTERESTS IN ENTERPRISES ENGAGED WITHIN ITS TERRITORIES IN THE MASS MEDIA AND TELECOMMUNICATIONS, AIR, LAND, OR WATER TRANSPORT, ELECTRIC, WATER AND GAS FACILITIES. TRUST FUNCTIONS, BANKING INVOLVING LIMITED OFFICIAL USE LIMITED OFFICIAL USE

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DEPOSITORY FUNCTIONS, OR THE EXPLOITATION OF LAND OR OTHER NATURAL RESOURCES, PROVIDED THAT IT SHALL ACCORD TO NATIONALS AND COMPANIES OF THE OTHER PARTY TREATMENT NO LESS FAVORABLE IN THIS CONNECTION THAN THAT ACCORDED NATIONALS AND COMPANIES OF ANY THIRD COUNTRY. NEW LIMITATIONS IMPOSED BY EITHER PARTY UPON THE EXTENT TO WHICH ALIENS ARE ACCORDED NATIONAL

TREATMENT WITH RESPECT TO CARRYING ON WITHIN ITS TERRITORIES THE ACTIVITIES DESCRIBED IN THIS PARAGRAPH SHALL NOT BE APPLIED AGAINST NATIONALS OF THE OTHER PARTY THAT ARE ENGAGED IN SUCH ACTIVITIES THEREIN AT THE TIME SUCH NEW LIMITATIONS ARE ADOPTED. MOREOVER, NEITHER PARTY SHALL DENY TO TRANSPORTATION, MASS MEDIA, TELECOMMUNICATIONS AND BANKING COMPANIES OF THE OTHER PARTY THE RIGHT TO MAINTAIN BRANCHES AND AGENCIES TO PERFORM FUNCTIONS NECESSARY FOR ESSENTIALLY INTERNATIONAL OPERATIONS IN WHICH THEY ARE PERMITTED TO ENGAGE. UNQTE.

COMMENT: WE RECOGNIZE THAT PROPOSED PARAS 1 AND 2 ARE INCONSISTENT WITH CERTAIN PHILIPPINE LAWS, SUCH AS INVESTMENT INCENTIVES LAW. WE SEE NO VIRTUE IN STARTING WITH A DRAFT THAT ATTEMPTS TO ACCOMMODATE PHILIPPINE PROTECTIVE LEGISLATION, PARTICULARLY SINCE OUR CONSISTENT POSITION SINCE 1967 HAS BEEN THAT WE CANNOT IMAGINE CONCLUDING A NATIONAL TREATMENT CLAUSE THAT WOULD LEAVE DEFINITION OF INTERESTS SUBJECT TO NATIONAL TREATMENT TO SUBSEQUENT UNILATERAL DETERMINATION FROM TIME TO TIME BY GOP. UNLESS GOP IS PREPARED TO AMEND ITS LAWS, MFN PLUS LAST TWO SENTENCES OF PARA 2 OF THIS DRAFT ARTICLE ARE ALL THAT WOULD BE NEGOTIABLE WITH GOP, AND OUR PRESENT JUDGMENT IS THAT WOULD BE INADEQUATE.

SECOND SENTENCE IN PARA 2 HAS BEEN ADDED TO EMPHASIZE TREATMENT EXPECTED FOR U.S. NATIONALS CURRENTLY ENGAGED IN COMMERCIAL ACTIVITIES IN THE PHILIPPINES. THIS IS A MORE EXPLICIT FORMULATION THAN THAT CONTAINED IN

ARTICLE IV:1 RELATING TO VESTED RIGHTS. WE FEEL THAT, IN
VIEW OF THE KNOWN AREAS OF CONTROVERSY WHICH EXIST IN
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U.S.-PHILIPPINE ECONOMIC RELATIONS, IT WILL BE DESIRABLE
TO START OUT WITH AS STRAIGHT-FORWARD A STATEMENT OF
PROTECTION OF EXISTING RIGHTS AS POSSIBLE. EMB MIGHT
GIVE THOUGHT TO ACCEPTABLE DEFINITION OF RETAIL TRADE
WHICH COULD BE INCLUDED IN AGREEMENT IN EVENT GOP REQUESTS
EXCEPTION FOR THIS AREA.

THIRD SENTENCE PARA 2 HAS BEEN ADDED TO ASSURE THAT
RESTRICTIONS IMPOSED ON TRANSPORTATION, BANKING, ETC.,
DO NOT AFFECT RIGHT TO OPERATE OF AIRLINE TICKET SALES
OFFICES, NEWS BUREAUS, INTERNATIONAL BANKING OFFICES AND
THE LIKE.

14. ARTICLE V:3. DEPT FAVORS PRESENTATION OF FOLLOWING
TEXT:

QTE. THE PROVISIONS OF PARAGRAPH 1 OF THIS
ARTICLE DO NOT EXTEND TO PROFESSIONS WHICH, BECAUSE
THEY INVOLVE THE PERFORMANCE OF FUNCTIONS IN A
PUBLIC CAPACITY OR IN THE INTERESTS OF PUBLIC HEALTH
AND SAFETY, ARE STATE-LICENSED AND RESERVED BY LAW
TO NATIONALS OF THE COUNTRY.

15. ARTICLE V:4. DEPT. FAVORS PRESENTATION OF TOGO ART.
V:2 WITHOUT CHANGE.

COMMENT: EMBASSY'S PROPOSED LANGUAGE CONCERNING AN
EXCEPTION TO NATIONAL TREATMENT FOR LIMITATIONS IMPOSED
ON NUMBER OF FIRMS MAY PROVE USEFUL, BUT IT WOULD STILL
REQUIRE AMENDMENT OF EXISTING PHILIPPINE LAWS. WE
BELIEVE IT IS BETTER TO PLACE ON GOP BURDEN OF SUGGESTING
COMPROMISE FORMULAS, WHICH WE CAN THEN CONSIDER.

16. ARTICLE V:5. DEPT FAVORS PRESENTATION OF TOGO ART.
V:3 WITHOUT CHANGE.

COMMENT: AFTER DUE CONSIDERATION, WE HAVE CONCLUDED
THAT ONLY A UNILATERAL FORMULATION COULD BE EMPLOYED
TO TAKE CARE OF PROBLEM CITED BY EMBASSY, SINCE RECOGNITION
OF HIRING PREFERENCE FOR U.S. NATIONALS WITHIN U.S.
WOULD BE INCONSISTENT WITH U.S EQUAL EMPLOYMENT OPPOR-
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TUNITY LAWS. WE WOULD BE RELUCTANT TO PROPOSE FORMULA-
TION SUGGESTED BY EMBASSY, SINCE (1) WE CANNOT COMMIT

U.S. FIRMS TO "RECOGNIZE" THE INTERNATIONAL PRACTICE (IF THERE IS ONE) OF HIRING HOST COUNTRY NATIONALS, AND (2) EMBASSY TEXT CONTAINS NO EFFECTIVE COMMITMENT BY GOVERNMENTS. WE ARE FURTHER RELUCTANT AT THIS TIME TO PROPOSE A UNILATERAL COMMITMENT TO ENCOURAGE U.S. NATIONALS AND COMPANIES TO HIRE PHILIPPINE NATIONALS, BUT MIGHT CONSIDER THIS APPROACH IF GOP BALKS AT TOGO TEXT.

17. ARTICLE V:6 (TOGO ART. V:4).

18. ARTICLE VI:1. DEPT FAVORS PRESENTATION OF TOGO TEXT WITHOUT CHANGE (SEE COMMENT BELOW).

19. ARTICLE VI:2. DEPT FAVORS PRESENTATION OF FOLLOWING NEW TEXT-

QTE. NATIONALS AND COMPANIES OF EITHER PARTY OWNING ANY INTEREST IN REAL PROPERTY WITHIN THE TERRITORY OF THE OTHER PARTY ON THE DATE OF ENTRY INTO FORCE OF THIS TREATY MAY CONTINUE TO OWN SUCH INTEREST, SUBJECT TO THE PROVISIONS OF ARTICLE IV, PARAGRAPH 2; AND, IN ADDITION TO THE RIGHTS CONFERRED BY PARAGRAPH 1 OF THIS ARTICLE, NATIONALS OWNING

ANY SUCH INTEREST MAY DISPOSE OF IT BY SALE, TESTAMENT OR OTHERWISE TO THEIR SPOUSES AND TO THEIR NATURAL DESCENDANTS, AND TO THEIR CHILDREN ADOPTED PRIOR TO THE AGE OF TEN YEARS. UNQTE.

COMMENT. BECAUSE THE LAWS OF CERTAIN U.S. STATES PROHIBIT ALIEN OWNERSHIP OF LAND, AND BECAUSE OF CONSISTENT POLICY IN COMMERCIAL TREATIES AREA NOT TO OVERRIDE STATE LAW IN AREAS OF TRADITIONAL STATE COMPETENCE, WE ARE RELUCTANT TO REQUEST RIGHT FOR U.S. NATIONALS TO ACQUIRE REAL ESTATE AFTER EXPIRATION OF LAUREL-LANGLEY. ABOVE PROVISION WILL PROVIDE CONTINUED RIGHT OF OWNERSHIP OF LANDS CURRENTLY OWNED BY U.S. CITIZENS, AND RIGHT FOR IMMEDIATE FAMILIES OF SUCH CITIZENS TO ACQUIRE SUCH LANDS IN THE FUTURE, SUBJECT TO THE RIGHT OF GOP TO TAKE LIMITED OFFICIAL USE
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FOR PUBLIC PURPOSE ON PAYMENT OF COMPENSATION. THE ABOVE TEXT IS MORE EXPLICIT THAN THAT PROPOSED BY EMBASSY, BUT APPEARS TO HAVE SAME GENERAL IMPORT.

20. ARTICLE VI:3. DEPT FAVORS PRESENTATION OF EMB MODIFICATION TOGO ARTICLE VI:2.

21. ARTICLE VII:1 (TOGO TEXT).

22. ARTICLE VII:2. DEPT FAVORS PRESENTATION OF FOLLOW-

ING TEXT:

QTE. EACH PARTY, HOWEVER, RESERVES THE RIGHT TO: (A) EXTEND SPECIFIC TAX ADVANTAGES ON THE BASIS OF RECIPROCITY, OR PURSUANT TO AGREEMENTS FOR THE AVOIDANCE OF DOUBLE TAXATION, OR THE MUTUAL PROTECTION OF REVENUE; (B) APPLY SPECIAL PROVISIONS IN CONNECTION WITH EXEMPTIONS OF A PERSONAL NATURE; AND (C) EXTEND ADVANTAGES TO ITS NATIONALS AND RESIDENTS IN CONNECTION WITH JOINT RETURNS BY HUSBAND AND WIFE. UNQTE.

COMMENT. EXCEPTION (D) OF TOGO TREAT IS UNUSUAL, AND IS NOT NEEDED BY THE UNITED STATES; ITS LANGUAGE IS POTENTIALLY VERY BROAD, AND WE WOULD NOT BE INCLINED TO ACCEPT IT AGAIN IN THE ABSENCE OF COMPELLING REASONS. IT SHOULD THEREFORE NOT BE PROPOSED. EXCEPTION (E) AS PROPOSED BY EMBASSY WOULD MEET SOME, BUT NOT ALL PROBLEMS OF PHILIPPINE LAW. WE ARE CONCERNED THAT THIS EXCEPTION COULD COMPLETELY ERODE CERTAINTY INHERENT IN NATIONAL TREATMENT. IF PROPOSED BY GOP, WE WOULD BE MOST RELUCTANT TO ACCEPT IT.

23. ARTICLE VII:3 (TOGO TEXT).

24. ARTICLE VII. (TOGO TEXT).

25. ARTICLE IX. DEPT FAVORS PRESENTATION OF TOGO TEXT WITHOUT CHANGE.

COMMENT. LANGUAGE IN TOGO TEXT IN PARA. 6 THIS LIMITED OFFICIAL USE LIMITED OFFICIAL USE

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ARTICLE CONCERNING FACILITATION OF FRONTIER TRAFFIC IS TAKEN DIRECTLY FROM ARTICLE XXIV OF THE GATT, AND IS NOT EXPRESSLY DESIGNED TO COVER PARTICULAR ADVANTAGES GRANTED BY U.S. TO CANADA OR MEXICO. EMBASSY PROPOSAL WOULD OPEN DOOR TO A POTENTIALLY WIDE AREA OF DEROGATION FROM MFN PRINCIPLE WHICH IS NOT IN ACCORD WITH GATT, TO WHICH GOP HAS NOW PROVISIONALLY ACCEDED. TO EXTENT PHILIPPINE EXCEPTIONS TO MFN ARE CONSISTENT WITH GATT, OR ARE CONSISTENT WITH A WAIVER OBTAINED FROM THE CONTRACTING PARTIES TO GATT UNDER ARTICLE XXV, THE "GATT EXCEPTION" IN THIS PARAGRAPH WOULD ACCOMMODATE THEM. WE WOULD HAVE NO INTEREST IN PROPOSING ANYTHING WHICH WOULD SANCTION DENIAL TO U.S. OF MFN TREATMENT. GOP SHOULD BE SENSITIVE TO THIS POINT, IN VIEW OF PROVISIONAL ACCESSION.

26. ARTICLE X (TOGO TEXT).

27. ARTICLE XI:1 THROUGH 3. (TOGO TEXT).

28. ARTICLE XI:4. DEPT. FAVORS PRESENTATION OF TOGO TEXT.

COMMENT: DEPARTMENT AGREES WITH EMB THAT SERIOUS QUESTIONS ARE RAISED BY U.S. CARGO PREFERENCE PRACTICES UNDER LANGUAGE TO TOGO AND OTHER TREATIES, AND ACKNOWLEDGES THAT GOP PRACTICES WILL RAISE SIMILAR QUESTIONS. WE ARE RELUCTANT, HOWEVER, TO AGREE AT THIS POINT TO CHANGE IN CLASSICAL FORMULATION USED IN ALL RECENT FCN AND AER TREATIES WHICH MIGHT CALL INTO QUESTION INTERPRETATION PLACED ON THAT FORMULATION BY USG. IN US VIEW, CARGO PREFERENCES ON GOVERNMENT-FINANCED CARGOES DO NOT VIOLATE TREATY PROVISIONS, BUT MERELY REFLECT RIGHT OF GOVERNMENT AS PROPRIETOR OF CARGO TO CHOOSE ITS SHIPPER. ALTHOUGH THIS INTERPRETATION SOUNDS STRAINED, IN PRACTICE THIS POSITION HAS BEEN MADE KNOWN TO COUNTRIES AT THE TIME TREATY IS NEGOTIATED, AND INTERPRETATION HAS BEEN ACCEPTED. OUR PREFERENCE, THEREFORE, IS TO SEEK THE SAME LANGUAGE, SUBJECT TO THE SAME INTERPRETATION, IN THE TREATY WITH THE PHILIPPINES.

29. ARTICLE XI: 5 AND 6. (TOGO TEXT).

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30. ARTICLE XII (TOGO TEXT).

31. ARTICLE XIII. DEPT FAVORS INSERTION AT THIS POINT OF A NEW ARTICLE, AS FOLLOWS:

QTE. THE TERRITORIES TO WHICH THE PRESENT TREATY EXTENDS SHALL COMPRISE ALL AREAS OF LAND AND WATER UNDER THE SOVEREIGNTY OR AUTHORITY OF EACH PARTY, OTHER THAN THE PANAMA CANAL ZONE AND THE TRUST TERRITORY OF THE PACIFIC ISLANDS. IT DOES NOT APPLY TO TERRITORIES IN THIRD COUNTRIES UNDER THE AUTHORITY OF EITHER PARTY SOLELY AS A MILITARY BASE OR BY REASON OF TEMPORARY MILITARY OCCUPATION. UNQTE.

COMMENT. THE FOREGOING IS RELATIVELY STANDARD TERRITORIAL APPLICABILITY CLAUSE, TAKEN FROM EARLIER FCN TREATIES. THE ABSENCE OF SUCH A CLAUSE IN THE TOGO, THAI AND OTHER AER-TYPE TREATIES HAS RAISED POTENTIAL QUESTIONS CONCERNING THE INTENT OF THE PARTIES.

32. ARTICLE XIV:1. DEPT FAVORS PRESENTATION OF TOGO TEXT (XIII:1) WITHOUT CHANGE.

COMMENT. WE HAVE NO INDICATION AT THIS POINT THAT GOP WOULD BE INTERESTED IN PROVISION MAKING EXCEPTION FROM TREATY

FOR REQUISITIONING MEASURES. THIS WOULD BE EXCEPTION FROM COMPENSATION PROVISIONS, AND THUS WOULD BE VIEWED RATHER SERIOUSLY BY USG; UNLESS GOP HAS A SPECIFIC INTEREST IN THIS SORT OF EXCEPTION, WE SHOULD NOT CONSIDER IT, AND THEN ONLY IF OTHER MATTERS CAN BE RESOLVED TO OUR SATISFACTION.

33. ARTICLE XIV:2 (TOGO TEXT, XIII:2).

34. ARTICLE XIV:3. TOGO TEXT (XIII:3) WITH DELETION OF QTE TO THE REPUBLIC OF CUBA, TO THE REPUBLIC OF THE PHILIPPINES, UNQTE. IN VIEW EXPIRATION OF LAUREL-LANGLEY PREFERENCES, THERE IS NO NEED TO PRESERVE EXCEPTION FOR CUBAN PREFERENCES.

35. DELETE TOGO ART. XIII:4 (SEE PARA. 5).

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36. ARTICLE XV. DEPT FAVORS PRESENTATION OF TOGO TEXT (XIV) WITHOUT CHANGE.

COMMENT: EMB IS APPARENTLY UNDER MISAPPREHENSION CONCERNING TIME AND EXPENSE OF PROCEEDING IN ICJ COMPARED TO PRIVATE ARBITRATION. TIME ELEMENT WOULD NOT VARY SUBSTANTIALLY WITH EITHER PROCEDURE, AND EXPENSE OF ARBITRATION WOULD BE SUBSTANTIALLY HIGHER THAN COST OF ICJ PROCEEDING, SINCE IT WOULD BE NECESSARY TO PAY ARBITRATORS AND STAFF. DEPT POLICY CONTINUES TO BE TO SUPPORT RESOLUTION OF INTERNATIONAL DISPUTES THROUGH THE ICJ.

37. ARTICLE XVI:1. (TOGO TEXT, XV:1)

COMMENT: PLACE OF RATIFICATION SHOULD BE LEFT BLANK UNTIL THE FINAL TEXT IS AGREED UPON. BY CUSTOM, RATIFICATIONS ARE EXCHANGED IN CAPITAL OF COUNTRY OTHER THAN THAT IN WHICH AGREEMENT IS SIGNED.

38. ARTICLE XVI:2. DEPT. FAVORS FOLLOWING:

QTE. THE PRESENT TREATY SHALL ENTER INTO FORCE JULY 4, 1974, OR ONE MONTH AFTER THE DAY OF EXCHANGE OF RATIFICATIONS, WHICHEVER DATE IS LATER. IT SHALL REMAIN IN FORCE FOR TEN YEARS AND SHALL CONTINUE IN FORCE THEREAFTER UNTIL TERMINATED AS PROVIDED HEREIN. UNQTE.

39. ARTICLE XVI:3. DEPT. FAVORS PRESENTATION OF EMB MODIFICATION OF TOGO TEXT.

40. EMB IS AUTHORIZED TO PASS DRAFT OF TREATY, IN ACCORDANCE WITH THIS MESSAGE, TO APPROPRIATE GOP OFFICIALS, AND TO COMMENCE EXPLORATORY TALKS WITH VIEW TO REACHING AGREE-

MENT ON TEXT OF TREATY. RUSH

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